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No. 02-1501

In the Supreme Court of the United States

MILLER WASTE MILLS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supports the finding of the National Labor Relations Board that petitioner withdrew recognition from the union on the basis of an employee petition that was tainted by antecedent unfair labor practices.

2. Whether the Board acted within its remedial discretion in issuing an affirmative bargaining order.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 315 F.3d 951. The decision and order of the National Labor Relations Board (Pet. App. B1-B23), and the decision of the administrative law judge (Pet. App. B23-B64), are reported at 334 N.L.R.B. No. 69. The Board's order denying petitioner's motion to reopen the record (Pet. App. C1-C6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 2003. The petition for a writ of certiorari was filed on April 10, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner manufactures thermal plastic molding compound at a plant in Winona, Minnesota. Pet. App. A2. Petitioner's employees were initially represented for purposes of collective bargaining by the Winona Free Union. In February 1996, the employees voted to affiliate with the United Automobile, Aerospace & Agricultural Implement Workers of America (UAW or Union). *Id.* at A2, B2 & n.4; see *id.* at B25. Petitioner challenged that affiliation vote, however, by refusing to recognize and bargain with the UAW. *Id.* at A2, B25. On February 20, 1997, the National Labor Relations Board (Board) issued a decision finding that the affiliation vote was valid and that petitioner violated Section 8(a)(5) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(5), by "refusing to recognize [the UAW] as the certified bargaining unit representative."[1] *Miller Waste Mills, Inc.*, 323 N.L.R.B. 15, 22 (1997). The Board ordered petitioner to recognize and bargain with the UAW. Pet. App. A2, B2-B3.

On August 26, 1997, petitioner and the UAW began contract negotiations. Pet. App. B3. Petitioner's established practice was to grant employees an annual wage increase in the month of December or January. *Ibid.* On January 2, 1998, however, petitioner sent the employees a letter stating:

> During [the] December 11 meeting, the UAW Union Committee stated they would allow [petitioner] to give the employees an increase in pay and to decrease insurance costs. * * * You will recall when

[1] Section 8(a)(5) of the NLRA makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. 158(a)(5).

> [petitioner] raised wages last year, the UAW filed an unfair labor practice charge against us.
>
> * * * * *
>
> This is a sad occasion for all of us as this marks the first time in [petitioner's] long history we won't be giving you a wage increase at this time. Please understand this is not the way we do business. We are continually exploring ways to ensure that neither our employees nor [petitioner] are damaged any further by this fiasco.

Id. at B3-B4; see *id.* at A3-A4, B36-B37. On January 15, 1998, approximately half of petitioner's employees requested petitioner to "grant us a fair and decent wage increase and better insurance for 1998." *Id.* at B5, B37; see *id.* at A4.

The next day, January 16, 1998, petitioner sent the employees a letter stating that "regardless of the UAW and the NLRB * * * we are going to do what you asked" and that petitioner was granting a wage increase of 51 cents per hour (the largest pay increase ever granted by petitioner). Pet. App. A4, B5 & n.7, B6, B37. On February 13, 1998, petitioner sent its employees another letter, notifying them of a reduction in their health insurance costs. *Id.* at B5, B6, B37-38; see *id.* at A4.

On February 25, 1998, petitioner received notification from a law firm that a majority of the employees had signed a petition stating that they no longer wished to be represented by the UAW. Pet. App. B5, B8; see *id.* at A4-A5, B38. At a negotiation session on February 26, petitioner advised the Union that, based on the employee petition, it would no longer recognize and bargain with the Union. *Id.* at B5; see *id.* at A5, B39.

2. Acting on charges filed by the Union, the Board's General Counsel issued an unfair labor practice complaint against petitioner. Pet. App. B23, B24. The Board, in substantial agreement with the administrative law judge (ALJ), sustained the complaint in relevant part. *Id.* at B1, B6-B13; see *id.* at B45-B46, B47-B52.

a. The Board found that petitioner's January 2, 1998, letter "misrepresented the Union's bargaining positions and blamed the Union for preventing the employees from receiving their customary annual wage increase," in violation of NLRA Section 8(a)(1), 29 U.S.C. 158(a)(1).[2] Pet. App. B6. The Board further found that petitioner's letters of January 16 and February 13, 1998, constituted "direct dealing" with employees in violation of NLRA Section 8(a)(5). *Id.* at B6-B7. The Board noted that the January 16 letter informed the employees that petitioner was going to "do what you asked" and grant a wage increase "[r]egardless of" the Union. *Id.* at B6. The Board also noted that petitioner did not consult with the Union before sending these letters, even though they addressed matters pertaining to the terms of employment (*i.e.*, wages and health insurance costs). *Id.* at B6-B7.

The Board further found that petitioner violated Section 8(a)(5) when it withdrew recognition from the Union on the basis of the February 25, 1998, employee petition. Pet. App. B8-B13. The Board concluded that the February 25 employee petition was "tainted by

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[2] Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the NLRA, among which is the right "to form, join, or assist labor organizations." 29 U.S.C. 157.

[petitioner's] unfair labor practices" and that petitioner therefore "was not entitled to rely on the petition as a valid expression of employee sentiment." *Id.* at B8, B11, B13. In so concluding, the Board applied the settled principle that "an employer may not withdraw recognition from a union while there are unremedied unfair labor practices tending to cause employees to become disaffected from the union." *Id.* at B8. The Board emphasized that "[a]n employer cannot rely on an expression of disaffection by its employees which is attributable to its own unfair labor practices directed at undermining support for the union." *Id.* at B9. Applying its established test for determining whether a "causal relationship exists between the unremedied unfair labor practices and the subsequent expression of employee disaffection with an incumbent union," the Board found a "strong causal connection" between petitioner's three unlawful letters to the employees and "the employee petition on which [petitioner] relied in withdrawing recognition from the Union." *Id.* at B9-B11 (citing *Master Slack Corp.*, 271 N.L.R.B. 78 (1984)).[3]

The Board rejected petitioner's contention that its withdrawal of recognition was justified by other evidence of employee disaffection from the Union that "predated any alleged unfair labor practices." Pet. App. B11. The Board explained that, "[i]n analyzing

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[3] Under the Board's causation test, the relevant factors include: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the unlawful acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union. *Master Slack Corp.*, 271 N.L.R.B. at 84. See Pet. App. B9.

the adequacy of an employer's defense to a withdrawal of recognition allegation, the Board will only examine factors actually 'relied on' by the employer." *Id.* at B12. The Board found that, when petitioner withdrew recognition from the Union, it "relied solely on the February 25 employee petition" (*id.* at B13) and "did not withdraw recognition because of 'other factors.'" *Ibid.*

b. To remedy petitioner's unlawful withdrawal of recognition from the Union, the Board, applying its decision in *Caterair International*, 322 N.L.R.B. 64 (1996), issued an affirmative bargaining order. Pet. App. B14; see *id.* at B18-B19.[4] The Board adhered to the view expressed in *Caterair* that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." *Id.* at B14-B15 (quoting 322 N.L.R.B. at 68). In addition, because the United States Court of Appeals for the District of Columbia Circuit has required the Board to justify, on the facts of each case, the issuance of an affirmative bargaining order under a three-part balancing test devised by the court, the Board undertook such an analysis here. *Id.* at B15-B17. The Board concluded that an affirmative bargaining order was also warranted under that balancing test. *Ibid.*

3. After the Board issued its decision, petitioner filed a motion to reopen the record. Pet. App. C1-C6.

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[4] If the Board has issued an affirmative bargaining order, it will not conduct, for a reasonable period of time, a decertification election among the employees covered by that order. By contrast, if only a cease-and-desist order has been issued, there is no temporary bar to the holding of a decertification election. See Pet. App. B15, B17; *Lee Lumber & Bldg. Material Corp.* v. *NLRB*, 310 F.3d 209, 219 (D.C. Cir. 2002); *Caterair Int'l*, 322 N.L.R.B. at 65.

Petitioner sought leave from the Board to adduce evidence of "changed circumstances" allegedly demonstrating that an affirmative bargaining order was not warranted. *Id.* at C2. The Board denied petitioner's motion to reopen the record because the motion did not comply with the Board's rules. *Id.* at C2-C3; see *id.* at C3-C6.

4. The Eighth Circuit enforced the Board's order. Pet. App. A2, A9. Applying the substantial evidence test, the court concluded that it was "in full agreement with the Board's findings." *Id.* at A7. The court concluded that the Board did not abuse its discretion in "directing [petitioner] to bargain with the UAW." *Id.* at A8. The court also concluded that the Board did not abuse its discretion in denying petitioner's motion to reopen the record. *Id.* at A9.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. A union is ordinarily entitled to an irrebuttable presumption of majority support for one year following its certification by the Board as the representative of a bargaining unit of employees. After the certification year, the union is entitled to a rebuttable presumption of majority support. *Auciello Iron Works, Inc.* v. *NLRB*, 517 U.S. 781, 785-786 (1996); *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 777-778 (1990). At the time of the events in this case, the Board generally permitted an employer to rebut the presumption of majority support for the union, and to withdraw recognition from the union, by demonstrating either (i) that the union did not in fact enjoy majority support

or (ii) that the employer had a good-faith doubt, based on a sufficient objective basis, of the union's majority support. *Auciello Iron Works*, 517 U.S. at 786-787; *Curtin Matheson*, 494 U.S. at 778.[5]

The Board's withdrawal-of-recognition rules, however, "assume[] that the employer did not commit any unfair labor practice." *Lee Lumber & Building Material Corp.* v. *NLRB*, 117 F.3d 1454, 1458 (D.C. Cir. 1997). When, as here, the employer commits unfair labor practices and withdraws recognition from a union in reliance on an employee petition that was tainted by those practices, the Board, with court approval, has repeatedly concluded that the employer's withdrawal of recognition violates NLRA Section 8(a)(5). See, *e.g.*, *Vincent Industrial Plastics, Inc.* v. *NLRB*, 209 F.3d 727, 737-738 (D.C. Cir. 2000); *NLRB* v. *Williams Enterprises, Inc.*, 50 F.3d 1280, 1288-1289 (4th Cir. 1995); *Radisson Plaza Minneapolis* v. *NLRB*, 987 F.2d 1376, 1383 (8th Cir. 1993); *NLRB* v. *Powell Elec. Mfg. Co.*, 906 F.2d 1007, 1014-1015 (5th Cir. 1990); *Hearst Corp.*, 281 N.L.R.B. 764, 764-765 (1986), enforced mem., 837 F.2d 1088 (5th Cir. 1988).

Consistent with that settled principle, the Board in this case concluded that petitioner violated Section 8(a)(5) when it withdrew recognition from the Union on the basis of the tainted February 25, 1998, petition. See

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[5] In *Levitz Furniture Co.*, 333 N.L.R.B. 717 (2001), the Board reexamined the applicable legal and policy considerations and decided to abandon its "good-faith doubt" standard for withdrawing union recognition. The Board concluded that an employer may withdraw recognition only by demonstrating that the union had in fact lost majority employee support. *Id.* at 717, 725. That changed interpretation did not affect cases then pending before the Board (such as the present case), because the Board elected to apply it only prospectively. *Id.* at 729. See Pet. App. B8 n.12.

Pet. App. B9-B11, B13. The conclusion of the court of appeals that substantial evidence supports that finding (see *id.* at A6, A7-A8) does not warrant review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

b. Petitioner contends (Pet. 25-26) that, under this Court's decision in *Allentown Mack Sales & Service, Inc.* v. *NLRB*, 522 U.S. 359 (1998), petitioner established that it had a good-faith doubt as to the Union's majority status when it withdrew recognition. Petitioner asserts (Pet. 25) that "the record contains numerous items of evidence predating [petitioner's] alleged [unfair labor practices] that confirmed pre-existing employee disaffection with the UAW." There is no merit to these contentions.

In determining whether petitioner lawfully withdrew recognition from the Union, the Board applied the settled rule that it examines only those "factors actually 'relied on' by the employer." Pet. App. B12. See *Dayton Motels, Inc.*, 212 N.L.R.B. 553, 553 n.3, 556 (1974), enforced, 525 F.2d 476 (6th Cir. 1975) (per curiam). The Board, upheld by the court of appeals, correctly found that petitioner relied solely on the tainted February 25, 1998, employee petition in withdrawing recognition from the Union and that none of the "other factors" allegedly predating its violations "played any part whatsoever in [petitioner's] decision." Pet. App. B13; see *id.* at A6, A7.

Petitioner does not contest the validity of the *Dayton Motels* rule that the Board will examine only those factors upon which the employer actually relied to determine whether a withdrawal of recognition was lawful. Nor does the decision of this Court in *Allentown Mack* provide petitioner with a basis for circumventing *Dayton Motels*. In *Allentown Mack*, the Court

did not address the validity of the *Dayton Motels* rule. Instead, the Court concluded that substantial evidence did not support the Board's finding that the employer in that case lacked a good-faith reasonable doubt as to the union's continued majority status. 522 U.S. at 366-371. Consistent with the Board's decision here, the Court's analysis in *Allentown Mack* presupposed that the employer in that case had actually relied on the evidence under review. See *id.* at 369 (noting "the effect upon [the employer]" of an employee's statement); *id.* at 371 (finding that employer reasonably gave "great credence" to an assertion made by the union steward).

c. Petitioner contends (Pet. 26-27) that the Board failed to apply its established causation test in finding that petitioner's unfair labor practices tainted the February 25, 1998, employee petition. There is no merit to that contention. In *Lee Lumber & Building Material Corp.*, 322 N.L.R.B. 175 (1996), enforced in relevant part, 117 F.3d 1454 (D.C. Cir. 1997), the Board explained that, to determine whether there is "proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of [majority] support" for the union, the Board "considers several evidentiary factors," as delineated in *Master Slack Corp.*, 271 N.L.R.B. 78, 84 (1984). *Lee Lumber*, 322 N.L.R.B. at 177 & n.16.

Those *Master Slack* factors were explicitly applied by the Board in this case. See Pet. App. B9-B11; page 5 & note 3, *supra*. Applying those factors, the Board found a "strong causal connection" between petitioner's unfair labor practices and the February 25 employee petition. Pet. App. B10. Although petitioner suggests (Pet. 27) that certain conduct on the part of the Union may have caused employee dissatisfaction, petitioner does not challenge the validity of the Board's *Master*

Slack causation test and does not contend that the Board misapplied that test to the facts of this case.

d. Petitioner also contends (Pet. 27-28) that the February 25, 1998, employee petition was not tainted because its letters to employees of January 2, January 16, and February 13 did not constitute unfair labor practices. Petitioner asserts (Pet. 28) that its letters "were simple communications to the workforce regarding the status of changes at issue—all of which is protected free speech" under Section 8(c) of the NLRA, 29 U.S.C. 158 (c). There is no merit to petitioner's contention. Section 8(c) provides that the written expression of "views, argument, or opinion" shall not constitute an unfair labor practice "if such expression contains no threat of reprisal or force or promise of benefit." That provision does not shield employer communications that amount to unlawful direct dealing *(i.e.*, the January 16 and February 13, 1998 letters, Pet. App. B6-B7) or that interfere with protected employee rights (*i.e.*, the January 2, 1998 letter, *id.* at B6). See *Facet Enterprises, Inc.* v. *NLRB*, 907 F.2d 963, 969 (10th Cir. 1990) (communication that constitutes unlawful direct dealing not shielded by Section 8(c)); *Safeway Trails, Inc.* v. *NLRB*, 641 F.2d 930, 933 (D.C. Cir. 1979) (per curiam) (communication may fall outside Section 8(c) although it does not contain a "threat of reprisal or force or promise of benefit"), cert. denied, 444 U.S. 1072 (1980).[6]

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[6] In *Americare Pine Lodge Nursing & Rehabilitation Center* v. *NLRB*, 164 F.3d 867 (4th Cir. 1999), the court, addressing the relationship between unlawful direct dealing and Section 8(c) during contract negotiations, concluded that "the employer may freely communicate with employees in noncoercive terms, as long as those communications do not contain some sort of express or implied quid pro quo offer that is not before the union." *Id.* at 875.

2. a. To remedy petitioner's unlawful withdrawal of recognition from the Union, the Board, applying its decision in *Caterair International.*, 322 N.L.R.B. 64 (1996), issued an affirmative bargaining order. See Pet. App. B14-B15. Unlike a cease-and-desist order, an affirmative bargaining order temporarily precludes a challenge to the union's status as the employees' bargaining representative for a reasonable period of time. *Caterair*, 322 N.L.R.B. at 65. See Pet. App. B15, B17.

In *Caterair*, the Board addressed the view of the District of Columbia Circuit that, because of the potential impact of a temporary decertification bar on the right of employees to remove an incumbent union as their bargaining representative, the Board must justify an affirmative bargaining order in each case under a three-part test devised by the court. See, *e.g.*, *Vincent Industrial Plastics, Inc.* v. *NLRB*, 209 F.3d 727, 738 (D.C. Cir. 2000); *Peoples Gas System, Inc.* v. *NLRB*, 629 F.2d 35, 46 (D.C. Cir. 1980). After fully reexamining the pertinent legal and policy considerations, however, the Board in *Caterair* reaffirmed the Board's "longstanding policy that an affirmative bargaining order is the standard appropriate remedy for the restoration of the status quo after an employer's unlawful withdrawal of recognition from an incumbent union." 322 N.L.R.B. at 64. Although it applied that remedial policy in this case, in recognition of the District of Columbia Circuit's contrary view, the Board also applied that court's balancing test to the facts of this case.

The Board believes that *Americare Pine Lodge* reflects an unduly expansive construction of Section 8(c), and that the better view is reflected in cases such as *Facet Enterprises* and *Safeway Trails*, *supra*. In any event, petitioner does not rely on *Americare Pine Lodge* in support of its Section 8(c) claim in this case.

See Pet. App. B15-B17. The Board concluded that, even under that balancing test, "an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy" petitioner's NLRA violations. *Id.* at B17.

b. The Fourth Circuit has approved the Board's remedial approach and does not require a balancing test. *NLRB* v. *Williams Enterprises, Inc.*, 50 F.3d 1280, 1289-1290 (4th Cir. 1995). Petitioner errs, however, in contending (Pet. 15-16) that this case implicates the circuit conflict on the question whether the Board must apply the balancing test before issuing an affirmative bargaining order to remedy an unlawful withdrawal of recognition from an incumbent union.

The court of appeals in this case neither addressed nor objected to the holding of the District of Columbia Circuit that the Board must justify affirmative bargaining orders under a case-specific balancing test. Nor did the court of appeals in this case purport to adopt the differing view of the Fourth Circuit on that issue. Instead, the court simply concluded that the Board "did not abuse its discretion in directing [petitioner] to bargain with the UAW." Pet. App. A8. In reaching that conclusion, the court addressed and rejected petitioner's contention on appeal that the only proper remedy in this case would be a new election. See *id.* A8-A9; Pet. C.A. Br. 40 (contending that "if any remedy is deemed appropriate, a Board-conducted election should be held"). And, in rejecting that claim, the court (Pet. App. A8-A9) quoted extensively from this Court's decision in *NLRB* v. *P. Lorillard Co.*, 314 U.S. 512 (1942) (per curiam), which held that the court in that case had erred in requiring the Board to conduct an

election rather than enforce the Board's bargaining order.[7]

There is, in any event, no reason to believe that the outcome of this case would have been different in the District of Columbia Circuit or any other circuit. As noted above, the Board provided an alternative justification for the affirmative bargaining order under the balancing test. The subsequent Board decisions cited by petitioner (see Pet. 17 n.2) in which the Board has provided this alternative balancing analysis have routinely been enforced by the District of Columbia Circuit when review was in that court.[8] And, Board decisions containing an alternative analysis under the District of Columbia Circuit's test have also routinely been enforced in other courts of appeals.[9] There is

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[7] In support of its claim of a circuit conflict, petitioner cites (Pet. 15) the Eighth Circuit's decision in *NLRB* v. *Beverly Health & Rehabilitation Services, Inc.*, 187 F.3d 769 (1999). That case does not address the remedial question involved here. See *id.* at 772 (concluding that the Board did not abuse its discretion in "extending the certification year by six months" when the employer had bargained in bad faith with the union during the certification year).

[8] See *Marion Hosp. Corp.*, 335 N.L.R.B. No. 80, slip op. 4-5 (Aug. 27, 2001), enforced, 321 F.3d 1178 (D.C. Cir. 2003); *Trans-Lux Midwest Corp.*, 335 N.L.R.B. No. 22, slip op. 5-6 (Aug. 27, 2001), enforced, 53 Fed. Appx. 571 (D.C. Cir. 2002); *Metro Health, Inc.*, 334 N.L.R.B. No. 75, slip op. 3-4 (July 16, 2001), enforced, 49 Fed. Appx. 320 (D.C. Cir. 2002); *Scepter Ingot Castings, Inc.*, 331 N.L.R.B. 1509, 1509-1510 (2000), enforced, 280 F.3d 1053 (D.C. Cir. 2002).

[9] See *Horizon House Dev. Servs., Inc.*, 337 N.L.R.B. No. 9, slip op. 5-6 (Dec. 19, 2001), enforced, 57 Fed. Appx. 110 (3d Cir. 2003); *Bridgestone/Firestone, Inc.*, 332 N.L.R.B. 575, 577-578 (2000), enforced in relevant part *sub nom. Allied Indus. Employees* v. *NLRB*, 47 Fed. Appx. 449 (9th Cir. 2002); *Raven Services Corp.*,

therefore no reason to believe that the Board's affirmative bargaining order in this case would have been set aside in any circuit.

c. Petitioner contends (Pet. 17-20) that the decision of the court of appeals conflicts with decisions of other courts as to whether the Board must take into account "changed circumstances" and administrative delay in determining whether to issue an affirmative bargaining order in cases such as this one. There is no merit to that contention, for the opinion of the court of appeals does not address those issues in this case. Instead, the court simply held that the Board did not abuse its discretion in declining to grant petitioner's motion to reopen the record for the purpose of introducing evidence of changed circumstances that allegedly rendered an affirmative bargaining order unwarranted. Pet. App. A9; see *id.* at C1-C6. The court found that petitioner "fail[ed] to meet the requirements of the Board's rules and regulations that govern the reopening of the record" and "failed to promptly submit the new evidence or explain why it had not done so." *Id.* at A9. Those fact-specific rulings, which petitioner does not directly challenge, raise no issue warranting review by this Court.

Moreover, in denying petitioner's motion to reopen the record, the Board did consider the passage of time. The Board noted that petitioner had proffered evidence on whether "the amount of time that elapsed between [petitioner's] allegedly disaffection-causing, unlawful communications and the issuance of the Board's Decision and Order [would] render an affirmative bargaining order unnecessary and inappropriate." Pet. App.

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331 N.L.R.B. 651, 651-652 (2000), enforced, 315 F.3d 499 (5th Cir. 2002).

C5. The Board found, however, that petitioner had failed to carry its burden of demonstrating why the proffered evidence would support a retraction of the Board's affirmative bargaining order. *Ibid.* That case-specific ruling by the Board is not directly challenged by petitioner and does not, in any event, warrant review by this Court.[10]

d. Finally, relying on this Court's decision in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), petitioner contends (Pet. 20-21) that the Board's affirmative bargaining order in this case is "suspect because the Board failed to make any showing that the numerical majority [of employees] actually supported the UAW at any time, much less when [petitioner] withdrew recog-

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[10] Petitioner suggests that *NLRB* v. *Superior Fireproof Door & Sash Co.*, 289 F.2d 713 (2d Cir. 1961) (Pet. 19-20), and *Texas Petrochemicals Corp.* v. *NLRB*, 923 F.2d 398 (5th Cir. 1991) (Pet. 20), required the Board to hold an election solely on the ground of administrative delay. There is no merit, however, to the suggestion that the amount of time that elapsed in this case between petitioner's violations and issuance of the Board's order (about three and one-half years) constituted undue delay. In *Superior Fireproof*, the court conditioned its enforcement of a bargaining order on a Board election when, in addition to "inordinate" administrative delay, the union "had not given truly effective representation to the * * * employees" after it was certified. 289 F.2d at 723-724. In this case, by contrast, the Union was actively engaged in contract negotiation with petitioner when petitioner unlawfully withdrew recognition. See Pet. App. B3, B26-B40. And, in *Texas Petrochemicals*, the court conditioned its enforcement of a bargaining order on a Board election when, in addition to "lengthy" administrative delay, valid employee petitions indicated that a significant number of employees did not want to be represented by the union. 923 F.2d at 405-406. By contrast, in this case, the only petition bearing on employee union sentiment is the tainted, and therefore invalid, February 25, 1998, petition.

nition." Petitioner's contention lacks merit and its reliance on *Gissel* is misplaced.

In *Gissel*, this Court addressed the Board's authority to issue a bargaining order (instead of ordering an election) when a union seeks initial Board certification as the NLRA representative of the employees in the bargaining unit. See 395 U.S. at 614-615. Such a bargaining order ordinarily requires proof that the union enjoyed majority employee support—such as signed authorization cards. *Id.* at 614.

This case, however, does not involve a *Gissel*-type bargaining order. The Union in this case had already attained status as the Board-certified representative of petitioner's employees at the time of petitioner's unlawful withdrawal of recognition. In its February 20, 1997, decision, the Board had rejected petitioner's challenge to the employees' vote to change their union affiliation from the Winona Free Union to the UAW. The Board found that petitioner unlawfully refused to "recognize [the UAW] as the certified bargaining unit representative" of its employees. *Miller Waste Mills, Inc.*, 323 N.L.R.B. 15, 22 (1997).

Having been certified by the Board as the employees' bargaining representative on February 20, 1997, the Union was entitled to a rebuttable presumption of majority status when petitioner unlawfully withdrew recognition from it one year later. See *Auciello Iron Works, Inc.* v. *NLRB*, 517 U.S. 781, 785-786 (1996); *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 777-778 (1990); page 7, *supra*. The bargaining order in this case thus simply restores the Union to its presumptive status as the Board-certified majority representative of petitioner's employees.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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